No. 17-419

IN THE

Supreme Court of the United States

JAMES DAWSON AND ELAINE DAWSON,

Petitioners,

v.

DALE W. STEAGER,
State Tax Commissioner of West Virginia,

Respondent.

On Writ of Certiorari to the Supreme Court of Appeals of West Virginia

BRIEF OF *AMICUS CURIAE* NARFE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The National Active and Retired Federal Employees Association ("NARFE") is a 501(c)(5) nonprofit membership organization, founded in 1921, dedicated to protecting and enhancing the earned pay, retirement, and health care benefits of federal employees, retirees, and their survivors. There are presently 205,000 members of NARFE, and all will potentially be affected by this Court's decision in the pending case. Federal annuitants (former federal employees and their surviving spouses) rely on the protections against discriminatory tax treatment that Congress put in place in 4 U.S.C. § 111 and this Court confirmed in *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989), in which NARFE also submitted an amicus brief. Current federal employees must consider state tax treatment of federal retirement income in deciding where to live when they retire. Given the importance of this case to the interests of its members, NARFE submits this amicus curiae brief to call the Court's attention to the dangers posed by the West Virginia Supreme Court of Appeals' incorrect interpretation of § 111 and *Davis*, and the magnitude of the impact such an

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[1] Pursuant to Supreme Court Rule 37.6, the amicus curiae affirms that no counsel for a party authored this brief in whole or in part; that no party or counsel for a party made a monetary contribution toward the preparation or submission of this brief; and that no person other than the amicus curiae or its counsels made a monetary contribution to its preparation or submission. Pursuant to Supreme Court Rule 37.3, each party has consented to the filing of this brief, and copies of the consents are on file with the Clerk of the Court.

interpretation of *Davis* would have on NARFE's members.

SUMMARY OF ARGUMENT

4 U.S.C. § 111 protects federal annuitants from discriminatory tax treatment by state governments. Adopting West Virginia's incorrect interpretation of 4 U.S.C. § 111 and *Davis* will undermine that protection, jeopardizing the fair treatment of the retirement benefits of 2.6 million federal annuitants nationwide. Federal retirement benefits are modest, and in many cases less generous than state benefits for similarly situated retirees. Relaxing the protections of *Davis* would let state legislatures once again discriminate against federal retirees by extending tax exemptions for state retirees, who often wield significant political power, and denying those tax exemptions for similarly situated federal retirees.

This Court should reverse.

ARGUMENT

I. Adopting West Virginia's Incorrect Interpretation of 4 U.S.C. § 111 and *Davis* Would Risk Unfair Tax Treatment For 2.6 Million Federal Annuitants Nationwide, Not Just Retired Federal Marshals in West Virginia

In *Davis v. Michigan Department of Treasury*, this Court held that under 4 U.S.C. § 111 state tax schemes cannot impose a "heavier tax burden" on retired federal government employees than on retired state and local government employees unless there are "significant differences between the two classes." 489 U.S. at 815-816. *Davis* ensured that *all* federal

annuitants, numbering 2.6 million and growing, do not face discrimination from state governments in the taxation of their retirement benefits. That guarantee of fair treatment is now in jeopardy.

Four years after *Davis*, West Virginia amended its tax code to provide a complete tax exemption for income received from certain state retirement plans but only a partial tax exemption for federal retirement income. TAXATION—REVENUE ENHANCEMENT MEASURES, 1993 West Virginia Laws Ch. 156 (S.B. 463). Those exemptions are now codified at W.Va. Code § 11-21-12(c)(6) ("Section 12(c)(6)"). In 2013, Petitioner James Dawson, a retired U.S. Marshal, was denied a complete exemption under Section 12(c)(6). The West Virginia Supreme Court of Appeals upheld the denial on the ground that Section 12(c)(6) "was not intended to discriminate against former federal marshals," and therefore does not violate the doctrine of intergovernmental tax immunity as enunciated in *Davis*. *Steager v. Dawson*, No. 16-0441, slip op. at 9 (W. Va. May 17, 2017).

The opinion below dramatically weakens the protection afforded by § 111 and *Davis* to federal retirees. It misreads *Davis* to prohibit only those discriminatory tax schemes that provide "blanket" exemptions for *all* state retirees but deny those exemptions to all similarly situated federal retirees. *Id.* at 10. Under the lower court's reading, provisions like Section 12(c)(6) are permissible because they are intended to "give a benefit to a very narrow class of state retirees" rather than discriminate against federal retirees. *Id.* This reading of § 111 and *Davis* is completely inconsistent with *Davis* and its progeny. If

permitted to stand, it would undermine *Davis's* guarantee of equal tax treatment and expose 2.6 million federal annuitants to discriminatory treatment across the nation.

State tax treatment of federal retirees varies widely across the country. *See* NATIONAL ACTIVE AND RETIRED FEDERAL EMPLOYEES ASSOCIATION, STATE TAX TREATMENT OF FEDERAL ANNUITIES (Apr. 2017). Almost all of these laws, however, can be traced to *Davis*. Prior to 1989, many states exempted *all* state retirement benefits from personal income taxation, while taxing retirement benefits paid by all other employees, including federal government retirees. Jerome R. Hellerstein & Walter Hellerstein, State Taxation ¶ 22.04[3][a][i] (3d ed. 2017) (hereinafter "State Taxation"). In the wake of *Davis,* there was a surge of legislative activity as states strove to scrub these discriminatory provisions from their tax codes. *See* Dan T. Coenen & Walter Hellerstein, *Suspect Linkage: The Interplay of State Taxing and Spending Measures in the Application of Constitutional Antidiscrimination Rules*, 95 Mich. L. Rev. 2167, 2178-2179 (1997) ("State legislatures, duty-bound after *Davis* to remove provisions favoring state over federal employees from their taxing systems, went to work as well"); State Taxation ¶ 22.04[3][a][i].

The most straightforward way for states to comply with § 111 and *Davis* was to adjust their tax exemptions so that federal and state retirees received equal treatment. This could be done either by extending exemptions to federal retirees or by eliminating exemptions for state retirees. But neither option was politically attractive: extending exemptions to federal retirees would require raising

taxes on other constituents or reducing spending on state services to make up for the lost taxes, while eliminating exemptions for state retirees would alienate a powerful interest group. Coenen & Hellerstein, *supra* at 2178-2179; State Taxation ¶ 22.04[3][a][i].

As a result, some states (West Virginia included) tried to circumvent § 111 and *Davis* by providing tax exemptions only to certain sub-classes of state retirees rather than to state retirees as a whole, while largely retaining the tax burdens on federal employees. Under this strategy, as long as states steered clear of so-called "blanket" tax exemptions for *all* state retirees, they could cater to powerful interest groups by doling out favorable treatment to specific sub-classes of state retirees while denying the same treatment to similarly situated federal retirees, who typically lack the same political influence with state legislatures. Some states have held that such schemes are unlawful under *Davis*. *See, e.g., Hackman v. Director of Revenue*, 771 S.W.2d 77, 80 (Mo. 1989) (holding that Missouri's taxation scheme was unlawful because "[t]he effect of Missouri's scattered retirement benefit exemption statutes is identical to that of Michigan's exemption statute for purposes of a *Davis* analysis"). If the lower court's decision is left standing, however, states would be given a green light to implement this strategy for favoring state retirees—precisely the sort of discriminatory treatment that this Court prohibited in *Davis*.

The potential impact of the decision below is far from narrow. The lower court's misinterpretation of § 111 and *Davis* would not merely deny the petitioners

in this case a tax exemption. Nor would it affect only retired U.S. Marshals living in West Virginia, or only retired federal law enforcement officers living in the Mountain State. Instead, if the lower court's construction of *Davis* bars were left standing, it would expose *all* federal retirees across the country to discriminatory treatment schemes such as the one exemplified by Section 12(c)(6).

II. Adopting West Virginia's Incorrect Interpretation of 4 U.S.C. § 111 and *Davis* Would Cause Serious Hardship For 2.6 Million Federal Annuitants

The approach adopted by the lower court would expose 2.6 million federal annuitants to discriminatory tax treatment by state governments. Such treatment would cause these annuitants serious hardship. Federal annuities are generally modest, and are subject to frequent attempts to cut them back. If the protections of § 111 and *Davis* are stripped away or greatly narrowed, federal annuitants in states across the nation will likely see their tax burdens rise.

In 2017, 2,637,152 federal annuitants received $6,812,369,000 in annuities, for an average monthly annuity of $ 2,583. U.S. OFFICE OF PERSONNEL MGMT., STATISTICAL ABSTRACTS FISCAL YEAR 2017: FEDERAL EMPLOYEE BENEFITS PROGRAMS 22 (Jan. 2018) (hereinafter "2017 ABSTRACTS"). As these figures demonstrate, many federal annuitants cannot rely on their pension benefits for financial security: 40.9% of federal employee annuitants receive under $2,000 per month in federal pension benefits, and 17.8% receive under $1,000 per month. *Id.*

These annuities are distributed by two different systems: FERS and CSRS. In general, federal employees hired after 1984 receive benefits through the Federal Employees Retirement System (FERS). 5 U.S.C. § 8401, *et seq*. In 2017, the mean monthly annuity for retired federal employees under FERS was $1,436 and the median monthly annuity was $1,121. 2017 ABSTRACTS at 8. Employees hired before 1984 receive benefits through the Civil Service Retirement System (CSRS). In 2017, their mean monthly annuity was $3,651 and their median monthly annuity was $3,171. 2017 ABSTRACTS at 8. However, retirees under CSRS neither paid into nor receive Social Security, and any Social Security benefits they may be eligible for from private sector work are diminished under the Windfall Elimination Provision (WEP). 42 U.S.C. § 410(a)(5), (7). As a result, "[f]or career employees under CSRS, the annuity is their sole source of retirement income." *Hearing on Federal Employees' Retirement Security Before the Subcommittee On The Federal Workforce, U.S. Postal Service and Labor Policy of the H. Comm. on Oversight and Government Reform*, 112th Cong. 3 (2012) (statement of David B. Snell, Director of Retirement Benefits Services, NARFE). Moreover, the maximum monthly benefit under CSRS is capped at 80% of the average of annuitant's "final average salary" (FAS), defined by CSRS as the average of the three years it was the highest. *Id.* at 3-4.

As demonstrated above, federal retirees enjoy only modest retirement benefits under both FERS and CSRS. Even so, there are frequent efforts to reduce or eliminate federal retirement benefits provided under both systems. *See, e.g., NARFE Reaction to President Trump's FY19 Budget: The Unprecedented Attacks*

on Federal Employees and Retirees Continue, NARFE (Feb. 12, 2018), https://www.narfe.org/index.cfm?fa=viewOldArticle&id=4340 (indicating nine 2019 budget proposals that would cut earned federal benefits).

State taxes already exact a significant portion of these modest retirement benefits in many states. If the non-discrimination requirements of *Davis* were narrowed, state legislators would have little reason not to implement tax schemes under which favored categories of state retirees enjoyed substantial exemptions but federal retirees paid taxes on essentially all of their income.

III. State Retirees Often Receive More Generous Retirement Benefits Than Federal Retirees

Under *Davis*, whether Petitioner Dawson was treated more favorably than "state civilian retirees . . . [and] retired state justices and circuit judges" and treated the same as "the vast majority of all state retirees," *Dawson*, slip op. at 8-9, is irrelevant to whether the state of West Virginia discriminated against him. *Davis*, 489 U.S. at 816. Because Section 12(c)(6) places a heavier tax burden on similarly situated federal and state law enforcement retirees, it is unlawful.

But putting this aside, focusing on Petitioner Dawson's individual retirement benefits obscures the fact that many state retirees receive greater benefits than federal retirees in both relative and absolute terms. For example, many state retirement systems calculate the benefits for retired state public safety

workers using more generous formulas than do the federal systems for retired federal public safety workers. *Compare* RONALD SNELL, *STATE GOVERNMENTS' PUBLIC SAFETY RETIREMENT PLANS - TABLES* (AUG. 2012), HTTP://WWW.NCSL.ORG/RESEARCH/FISCAL-POLICY/STATE-RETIREMENT-PLANS-PUBLIC-SAFETY-TABLES.ASPX (listing formulas determining benefits for retired public safety workers in each state), *with* 5 U.S.C. § 8339(d) (retired federal public safety workers receive 2.5% times their FAS for their first 20 years of service and 2% thereafter under CSRS), *and* 5 U.S.C. § 8415(e) (retired federal public safety workers receive 1.7% times their FAS their first 20 years of service and 1% thereafter under FERS). In particular:

- Retired Louisiana firefighters, police, and sheriffs receive 3.5%, 3.33%, and 3% times their FAS (as defined under Louisiana law) times their years of service.
- Retired West Virginia police officers receive 2.75% times their FAS (as defined under West Virginia law) times their years of service.
- Retired Wyoming firefighters receive 2.8% times their FAS (as defined under Wyoming law) times their years of service.

And in some instances, state retirees not only benefit from more generous calculations, but also receive significantly higher raw benefits than do federal similarly situated federal retirees. *Compare* Edward Ring, *What is the Average Pension for a Retired Government Worker in California?*, CALIFORNIA POLICY CENTER, (Mar. 10, 2017),

https://californiapolicycenter.org/what-is-the-average-pension-for-a-retired-government-worker-in-california/ (indicating that the average pension for retired law enforcement officers in several California cities exceeded $100,000), *with* 2017 ABSTRACTS at 15, 16 (indicating that, in 2017, the average CSRS pension for law enforcement officers was $68,304 and the average FERS pension for law enforcement officers was $45,948).

CONCLUSION

The judgment of the Supreme Court of Appeals of West Virginia should be reversed.

Respectfully submitted,

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